

STATE OF MICHIGAN  
COURT OF APPEALS

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MARILYN K. BUCKNER,

Plaintiff-Appellee,

v

DENNIS K. BUCKNER,

Defendant-Appellant.

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UNPUBLISHED

July 26, 2007

No. 266887

Muskegon Circuit Court

LC No. 04-024731-DO

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce. He challenges the trial court's factual findings with respect to two assets, Butch's, Inc., and his interest in MBA Real Estate, L.L.C. (MBA). We affirm.

Defendant argues that the trial court's valuation of Butch's, Inc., at nearly \$2.5 million is against the great weight of the evidence. We disagree. Where a party claims that a verdict rendered after a bench trial is against the great weight of the evidence, this Court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651-652; 662 NW2d 424 (2003). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Id.* at 652.

Plaintiff's expert was the only person to offer evidence of the valuation of Butch's, Inc., at trial. He analyzed the business using the adjusted book value method and valued the business at approximately \$2.5 million, but admitted that if the income approach to valuation was utilized, the business's valuation could possibly be about one million dollars less. Although plaintiff's expert testified that the income approach might be a more appropriate valuation method where the business intends to continue to operate, as in this case,<sup>1</sup> the trial court explained that it

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<sup>1</sup> Nothing in the trial proceedings, however, precludes defendant from selling the business should he decide to do so. And plaintiff's expert testified that the assets of the business are worth approximately \$2.5 million.

accepted the expert's higher valuation because his "valuation" using the income approach was admittedly speculative. The record supports this determination. Plaintiff's expert cautioned that his testimony regarding an income approach valuation was based only on the limited information he had before him, that he had not prepared a valuation using the income approach, and that he did not have sufficient information to make a credible valuation under that approach. Because plaintiff's expert was not offering a definitive valuation under the income approach, the trial court's finding that Butch's, Inc., was worth approximately \$2.5 million is not clearly erroneous or against the great weight of the evidence. Contrary to defendant's assertion, the trial court did not accept this value simply because it believed that the parties' valuations differed by only \$114,000. Defendant failed to present at trial an expert who actually performed a valuation using the income approach, yet demands consideration of such a valuation on the speculative basis of the cross-examination testimony given by plaintiff's expert who had not conducted an income approach valuation with respect to the business and who lacked the relevant data to properly testify on the issue at trial. As noted by the trial court, defendant had complete control over the financial information regarding the business, and he could have easily had it valued under various approaches, but chose not to do so. Defendant's reliance on an affidavit by his accountant, which was first presented to the court in the motion for new trial, and which sets forth some net cash flows for the stores that comprise the business, does not alter our conclusion. Assuming for the sake of argument that MCR 2.611(D)(1) even allows defendant to expand the trial record in the context of a great weight argument where the evidence could have been presented at trial and subjected to examination, the information in the affidavit does not give any context relative to a valuation or valuation methodology. Further, plaintiff's expert testified that he had profit and loss statements for the stores, but a "significant amount of adjustments" would have to be made to determine a reasonable cash flow for purposes of a valuation under an income approach, and relevant information was lacking. The accountant's affidavit provides no insight into adjustments and only addresses cash flows for half of 2005. Moreover, it appears from the affidavit that its sole purpose was merely to show that defendant could not afford the monthly payments under the judgment. We find no error in the trial court's ruling.

Defendant also asserts that the resultant property award is inequitable because the trial court ordered him to pay over \$6,000 a month to plaintiff in equalization payments, which defendant contends cannot be supported by Butch's, Inc.'s, cash flow.

A trial court's decision regarding the division of property is reviewed to determine if it was fair and equitable. *Baker v Baker*, 268 Mich App 578, 582; 710 NW2d 555 (2005). This Court will not reverse that decision unless it is left with a firm conviction that the division was inequitable. *Id.* We find that the trial court's property division is equitable. The trial court did not indicate that this monthly payment had to come from the business's operating income. Defendant was awarded sufficient assets with which to pay the monthly equalization payments, albeit he may be required to liquidate some assets. The trial court was aware of this possibility. What resources defendant chooses to draw on to pay the monthly payment is up to him.

Defendant next argues that the trial court improperly included his interest in MBA in the marital estate. Defendant asserts that he had no interest in this asset because he had previously gifted it to his children. Although defendant testified at trial that he intended to gift his interest in MBA to his children, he admitted in his closing argument brief that the testimony established that he owned the interest. He specifically requested that it be distributed to plaintiff and

included it as a marital asset to be awarded to plaintiff in his two proposals for division of the marital assets. Thus, defendant abandoned his argument that he did not own the interest. A party cannot take one position before a trial court and then take a contrary position on appeal after the trial court accepts that position. *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148-149; 724 NW2d 498 (2006). It would appear, upon review of the arguments below and now on appeal, that defendant wished the MBA interest to be included in the marital estate as long as it was awarded to plaintiff, thereby decreasing defendant's obligations relative to equalizing the division, but somehow, after defendant was awarded the interest, it became wrong to include the interest as part of the estate. Defendant cannot have it both ways; the interest is either marital property or it is not. He chose below to seek treatment of the MBA interest as part of the marital estate subject to division, and he cannot now back peddle from that position.

In sum, the trial court's decision to deny the motion for new trial did not constitute an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006).

Affirmed.

/s/ William B. Murphy

/s/ Brian K. Zahra

/s/ Deborah A. Servitto